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In The

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1082

ROBERT LEWIS KROGNESS, NEIL E. HART and THOMAS EDGAR RUSSELL,
Petitioners,

vs.

THE STATE OF OREGON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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THE STATE OF OREGON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Robert Lewis Krogness, Neil H. Hart and Thomas Edgar Russell pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Oregon made and entered in the above entitled case on December 31, 1963.

OPINIONS BELOW

The Circuit Court for Union County made an unreported opinion printed in Appendix A, page 14 hereof. The Supreme Court of Oregon filed an opinion printed in Appendix B, page 16. A dissenting opinion is printed in Appendix C, page 34 hereof, both of which are reported in 388 P2d 120.

JURISDICTION

The judgment of the Supreme Court of Oregon was made and entered on December 31, 1963. Timely petition for rehearing was denied on January 28, 1964. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED

1. Whether the standard used by the Oregon court of "any permissible inference" is a proper standard for determining a Federal Constitutional claim of unreasonable arrest, search and seizure.

2. Whether the procedure adopted by the Oregon court is adequate to determine a Federal Constitutional claim of unreasonable arrest, search and seizure when neither trial judge, jury nor appellate court passes upon the credibility of witnesses nor strength of inferences in the evidence bearing on this claim.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved is the 4th Amendment to the United States Constitution made applicable to the states by the 14th Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statute upon which the Supreme Court of Oregon based its decision was section 77.12.090 of the Revised Code of Washington.

> "Any ex officio game protector may search without warrant, any vehicle for game animals, game birds, or game fish which he has reason to believe contains evidence of violation of law or rules and regulations of the Commission.'

The traffic arrest sections of the Revised Code of Washington, sections 46.64.015, 46.64.020 and 46.64.030 were also involved and printed in Appendix F, page 70.

STATEMENT

The three petitioners were indicted for the burglary of the Elks Lodge in Pendleton, Oregon, and subsequently convicted and each sentenced to six years' imprisonment.

Their defense in the trial court was limited solely to the questions of inadmissibility of the evidence against them on the ground that it resulted from arrests, searches and seizures in violation of the 4th Amendment to the United States Constitution, made applicable to the States of Washington and Oregon, both here involved, by the 14th Amendment. The details of the methods of raising the Federal question in the trial court is set forth in Appendix D, page 51.

MOTION TO SUPPRESS

Prior to trial each defendant moved to suppress and return evidence obtained as a result of the unlawful

arrests, searches and seizures in King County, Washington, by Washington police officers.

The defendants desired to offer their own testimony and that of these officers thereon, but the Court declined to take such evidence. Instead, the Court considered the transcript of evidence taken in preliminary examination and on that basis denied the motions with a written opinion, Appendix D, page 51 Appendix A, p. 14.

But the magistrate on the preliminary examination had refused evidence on this matter holding it immaterial. Tr. P, Exp. 39, 54. This evidence, heard, however, was as follows:

EVIDENCE ON MOTION

At 11 a.m., March 8, 1962, Sergeant Frank Chase of the King County, Washington, Sheriff's Office in the unincorporated area of Woodenville, Washington, stopped an automobile driven by defendant Hart and placed Hart in custody under arrest for speeding (Pr. Ex. 28). The speeding charge was going 36 miles per hour in a 20 mile per hour school zone (Pr. Ex. 33). Defendants Krogness and Russell were passengers in that automobile (Pr. Ex. 34).

Sergeant Chase observed a hunting rifle exposed on the rear seat of the automobile which led him to believe that there may have been some game violation in the car, so he searched the car for this, in company with other officers, opened the trunk and found a bag of

money (Pr. Ex. 29). He found no game violation (Pr. Ex. 39). He then issued Hart an arrest citation and the automobile was impounded (Pr. Ex. 30).

Detective Ronald Moore of the King County, Washington, Sheriff's Office came to this scene (Pr. Ex. 41) and went through the bag of money and found a large amount of rolled coins and loose silver (Pr. Ex. 42) and removed the bag from the auto (Pr. Ex. 44). He found a .45 pistol under the front seat, a .32 pistol in a suitcase in the trunk; he knew Hart had a police record (Pr. Ex. 51) and Krogness (Pr. Ex. 52).

Defendants offered no explanation as to where the money came from so he took them to jail and held them for "investigation" (Pr. Ex. 52). He exlained there was no difference between "arrest" and "investigation" except investigation was on an "open" charge which is allowed in King County for 48 hours (Pr. Ex. 53).

No warrant was obtained before the car was searched (Pr. Ex. 53).

All three defendants were personally searched in the Sheriff's office later and money taken from their pockets (Pr. Ex. 45, 54, 55).

TRIAL

At the opening of the trial, each defendant renewed these motions and asked to offer evidence thereon. The Court directed that the trial proceed and the evidence in those motions would be taken as part of the trial of the case. The case then proceeded in the usual

way, the State giving its opening statement and the defendants giving their opening statement to the jury, which statement of defendants was addressed to the unreasonable nature of their arrests, searches and seizures (Nar. St. 1). Appendix D, p. 51.

At the time of the offer in evidence by the State of each item of evidence obtained by or resulting from the aforesaid arrests, searches and seizures, defendants objected thereto on the above ground, but were not allowed preliminary cross-examination thereon or to present evidence as to admissibility, the Court ruling that was precluded by determination of the pre-trial motion to suppress, overruled the objection, and admitted the evidence. (Nar. St. 1-3). Appendix D, p. 51.

At the end of the State's case, the defendants put on their evidence as to unlawful nature of the arrests, searches and seizures in the presence of the jury, and at the end of the case defendants each moved to strike each of the remaining items of evidence resulting from those arrests, searches and seizures except such testimony showing the unlawful nature therefrom and for direction of verdict of not guilty on the ground that there was insufficient evidence of guilt after this unlawfully obtained evidence was eliminated and on the ground that defendants were entitled to acquittal by virtue of the unconstitutional nature of the case against them, which motions were denied by the Court (Nar. St. 5-8). Appendix D, p. 54.

The parties to this appeal are agreed that the case against defendants was sufficient only if this evidence was properly usable against them (Nar. St. 10). Appendix D, p. 63.

JURY INSTRUCTIONS

Each of the defendants requested the Court to submit the questions of fact as to the reasonableness of the arrests, searches and seizures to the jury and requested a number of instructions on this subject. The Court refused to submit any question as to these arrests, searches and seizures to the jury and refused to give any of the requested instructions, to which each defendant excepted on the grounds heretofore stated (Nar. St. 8-10). Appendix D, p. 60.

EVIDENCE ON TRIAL

Sergeant Frank Chase testified on direct examination the same as in the preliminary examination above (Tr. VI 59-66) to a complete search of all parts of the car and every crevice and area thereof (Tr. VI 66).

On cross-examination he stated he was searching for a game law violation (Tr. VI 70), but he didn't know what, that it was for a bird or part of a deer, that he didn't know when the violation occurred, but it was recent, that it could have been one of the defendants who violated the game law, but he didn't know which one, that the violation had occurred in King County, Washington, where the vehicle was and the Swedish military rifle in plain sight, although the defendants had

been observed only in an auto on a paved highway in the middle of the day, and there was nothing unlawful in having such a rifle, but there was game in the area, although he knew of none being shot nor any blood and didn't know when the rifle had been fired, that although he knew Hart and Krogness, he was not aware of any game law violations by them (Tr. VI 69-78).

Sergeant Chase further testified Hart didn't refuse to sign the traffic citation (Tr. VI 84), that he didn't search the auto because it had been doing 36 miles per hour (Tr. VI 85), but it was impounded for the traffic violation (Tr. VI 97).

Sergeant Chase stated he arrested Krogness and Russell for aiding and abetting Hart's speeding, because they could have told Hart to be more cautious, but he didn't know they hadn't told him that (Tr. VI 87-88). He didn't recall whether he had observed the rifle before or after the arrest for aiding and abetting traffic violation (Tr. VI 110).

Detective Moore stated he did not arrest the defendants (Tr. VI 160). When confronted with his contrary testimony on preliminary examination (Tr. VI 160-162), he stated the defendants had apparently been already arrested by somebody else (Tr. VI 162, 163).

He stated his authority for the search and seizure was the arrest on a traffic charge and finding the guns and money in the car he then had reasonable ground to believe a felony had been committed (Tr. VI 164, 165),

and he ordered them held for investigation (Tr. VI 165). He first stated the felony was either armed robbery or burglary (Tr. VI 164), but then stated he didn't know what felony, where, or which of the defendants had committed it (Tr. VI 166).

Detective Moore testified none of the defendants was arrested or searched by warrant (Tr. VI 167, 168) and the car was impounded for safekeeping (Tr. VI 172). A week later at the garage he obtained dust samples from its floor. (Tr. VI 142, 143).

The search of defendants' persons was made in the Sheriff's office later and produced a large amount of paper currency and a small amount of coins (Tr. VI 137-140).

A store receipt was found under the car seat which placed defendants in the Pendleton area at the time of the burglary (Tr. VI, 179).

The amount of money somewhat approximated the amount taken in the Elks Lodge burglary in amount and kind, since the 200 pounds of silver money was like the money used in their illegal lotteries (Ex. 4, Supp. Tr. 6-17).

Some of the other property seized from the car could have been used as tools in committing the burglary, but other property was only clothes and personal articles of the defendants taken for laboratory examination. (Ex 1-4, Ex. List).

The defendant Russell testified that the Swedish military rifle was covered by clothes and concealed from view as he lay upon it in the back seat of the automobile (Tr. V II, p. 269, 270, 271).

APPEAL

After conviction, petitioners appealed to the Supreme Court of Oregon, limiting their appeal to the question of the use of evidence resulting from unlawful arrests, searches and seizures and assigning this as error Appendix E, page 61.

The Supreme Court of Oregon affirmed the convictions, holding that the presence of a Swedish military rifle on the seat of the automobile permitted an inference that defendants were hunting unlawfully and had contraband game hidden in the trunk of the automobile so that the police officers could search therefor, and, upon finding large amounts of money and possible burglary tools, could seize defendants and the physical objects as the fruits and means of committing crime, even though they did not know what crime or where or how committed.

The Court further held that all this material was then admissible in evidence where there is "any permissible inference", and no further inquiry into the truthfulness of the supporting witnesses or the strength of the inference either by the judge, jury or appellate court was necessary to establish "probable cause." Appendix B, page 16.

The dissenting opinion stated that a mere permissible inference did not rise to the Constitutional standard of probable cause, that the police officer's testimony was a sham and unbelievable and the search unlawful as a matter of law. Appendix C, page 34.

Petitioners filed timely petition for rehearing setting forth that not only was the standard of "any permissible inference" insufficient as the dissenting opinion sets out, but the majority opinion associating admissibility of the fruits of unlawful arrests, searches and seizures with admissibility of evidence generally, and upholding admissibility here, did not allow the trial judge, jury or appellate court to pass on the credibility of the witnesses or strength of the inference as to lawfulness. Appendix E, page 64.

This petition was denied without opinion.

Under Oregon practice the record is not printed but the appeal was heard by the Supreme Court of Oregon on the original record and exhibits, a typed transcript of evidence and an agreed narrative statement as to the matters necessary to the questions raised.

REASONS FOR GRANTING THE WRIT

1. Petitioners believe the Supreme Court of Oregon used an improper standard in determining probable cause when it ruled that the evidence was admissible if "any permissible inference" in its favor could be found. Appendix B, page 16. Petitioners believe the dissenting opinion of Mr. Justice O'Connell well sets forth why

this is erroneous and invites this Court's consideration thereof. Appendix C, page 34.

It should also be noted that the Supreme Court of Oregon is in conflict with this Court's decision in Preston v. U.S.—U.S.—dec. March 23, 1964 in admitting evidence obtained from an impounded car without warrant a week after the arrests.

2. Petitioners in addition believe the procedure approved by the Supreme Court of Oregon for determining the Federal Constitutional right is inadequate for this purpose.

The trial judge determined the pre-trial motion not from evidence heard by him, but on the transcript of the preliminary examination where the magistrate had refused to allow inquiry into this matter. Appendix D, page 51, Pr Ex 39, 54.

Then on the trial, the trial judge held he was bound by this determination of the pre-trial motion in ruling on admissibility. Appendix D, page 53.

In the past, fact questions on search and seizure in Oregon, like fact questions in voluntariness of confessions and similar matters, have been submitted to the jury. *State v. Marshall*—Or.—380 P2d 799, 800; *State v. Quartier*, 114 Or. 657, 665, 236 Pac. 746, 748; *State v. Jorden*, 146 Or. 504, 510, 26 P2d 558, 561.

But now in Oregon, once it is determined there is "any permissible inference" in favor of the lawfulness of the search, the evidence is to be admitted and neither

the trial judge, the jury nor the appellate court passes on the credibility of the witnesses or the strength of the evidence for or against the legality of the arrest, search and seizure.

This downgrades a Federal Constitutional right to the status of a rule of evidence. *Goulad v. U.S.*, 255 US 298, 313.

3. Under the standard and procedure adopted in this case by the Supreme Court of Oregon, whenever a claim of legality can be made, no matter how false or far-fetched, the evidence is admissible without further consideration of the falsity of the claim or improbability of the grounds asserted for the arrest, search or seizure.

Unless prevented this may be adopted in all other states which had not adopted their own exclusionary rule, and effectively neutralize the exclusionary rule of *Mapp v. Ohio*, 367 US 643.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment rendered by the Supreme Court of Oregon in this case.

Respectfully submitted,

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April 20, 1964.

APPENDIX A

Opinion of Circuit Court for Union County, Brownton, J.

I have considered the defendants' motion to suppress evidence in this case and to return certain property alleged to have been taken from the defendants' automobile by a sheriff's officer in the state of Washington. The motor vehicle of the defendants was searched following an arrest for a traffic violation. The property seized was not related to the traffic violation but to an unrelated crime. The officer's attention was first drawn to a rifle which he observed in the back seat of the vehicle. The officer, believing that a state game violation may have occurred, searched the trunk of the vehicle and discovered the property in question. It is the opinion of this Court that the original arrest was a lawful arrest and that the search of the car was made upon probable cause following the observation of the rifle which was observed in the defendants' car.

The Court has considered the various authorities submitted by counsel. The Court is in agreement with Mr. Lonergan's position that the ruling in Mapp v. Ohio would require the exclusion of evidence if it were obtained by an unlawful search, even though that search and seizure resulted in a jurisdiction different from that in which the defendants are prosecuted. State of Oregon v. Olson may in this respect be overruled. The Court in the case at bar, however, is of the opinion that the

search and seizure was lawful and therefore this evidence may be used by the State if otherwise relevant and material in the trial of this matter.

The motion for suppression of evidence and return of the property is therefore denied.

APPENDIX B

Opinion of the Supreme Court of Oregon
GOODWIN, J.

Robert Krogness, Neil Hart and Thomas Russell were convicted of a burglary committed in Pendleton, Oregon. They appeal.

The only question before this court is whether certain evidence was illegally seized. The questioned exhibits are burglars' tools and the loot from the burglary. They were found in the automobile in which the three defendants were riding. The automobile was stopped for a traffic violation. The evidence was taken in a search which followed. Timely motion was made to suppress the evidence.

The state argues that the illegality, if any, of the seizure cannot be a ground for suppressing the evidence in an Oregon court because the evidence was seized by police officers of the state of Washington. While this argument might have required discussion in former times (see *State of Oregon v. Olsen*, 212 Or 191, 317 P2d 938 (1957); the fruits of illegal police conduct may no longer be used as evidence in state courts. *Ker v. California*, 374 US 23, 83 S Ct 1623, 10 L Ed2d 726 (1963); *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed2d 1081, 84 ALR2d 933 (1961). Such evidence is inadmissible whether seized by Oregon officers or by police of another jurisdiction. *Cf. Elkins v. United States*, 364 US 206, 80 S Ct 1453, 4 L Ed2d 1669 (1960).

If the evidence was the fruit of illegal government action, it was error not to suppress it. *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed2d 441 (1963).

There is no claim in this case that the officers had a search warrant. Without a warrant, there can be no search or seizure, except for such reasonable search as may be an incident of a lawful arrest. *State v. Chinn*, 231 Or 259, 373 P2d 392 (1962).

In order to decide whether the trial court properly received the challenged exhibits in evidence, it is necessary to examine in some detail the testimony concerning the arrest of the defendants. There was some conflict in the testimony, but there was evidence from which the trial court could have determined the facts to be substantially as follows:

Sergeant rank Chase of the King County, Washington, sheriff's patrol observed an automobile pass through a marked school crosswalk at a speed of 36 miles per hour during school hours. The maximum speed permitted at that time and place was 20 miles per hour. RCWA 46.48.023. Officer Chase stopped the car. The driver got out of the stopped car and walked back toward the police car. Officer Chase recognized the driver as Neil Hart and greeted him by name. (There was other evidence in the cast to the effect that Hart had a police record known to Officer Chase and at least one minor conviction in Seattle.)

The officer immediately by radio informed his headquarters that he had stopped Hart and two other subjects for a traffic violation. Officer Chase told Hart to sit beside him in the police car. He asked Hart who is companions were. Officer Chase then left Hart sitting in the police car and approached Hart's car to verify the identities of Krogness and Russell. At that time, Officer Chase saw on the back seat of Hart's car a military-type rifle with a telescope sight. He did not know whether or not the weapon was loaded. There is no record that he inquired concerning the rifle.

About the time Officer Chase saw the rifle, other police cars arrived on the scene. Krogness and Russell were asked to get out of Hart's car and sit in the other police cars. For all practical purposes, Krogness and Russell as well as Hart were under arrest from that moment, if they had not been before. See *Henry v. United States*, 361 US 98, 80 S Ct 197, 4 L Ed2d 149 (1959); and *State v. Christensen*, 151 Or 529, 533-534; 51 P2d 835 (1935), where it is said that the mere stopping of the motorist and placing him under the officer's direction constituted an arrest. See generally on the law of arrest, Remington, *The Law Relating to 'On the Street' Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, in Police Power and Individual Freedom 15-18 (Sowle ed 1926). Officer Chase asked Hart for the keys to the luggage compartment of the latter's car. Hart complied. There is no serious claim that Hart did so voluntarily.

In the luggage compartment the officer found a sack which contained some 200 pounds of coins, mostly in rolls bearing the name of a Pendleton bank. He also observed certain tools. At this point, Officer Chase apparently yielded the initiative in the proceedings to Detective Ronald Moore, who had arrived on the scene. Officer Moore supervised the search of all three occupants of the Hart automobile. The officers found about $4,500 in money, coin and paper, including the rolled and loose coins in the luggage compartment. Two pistols also were found, concealed about the interior of the automobile.

Officer Chase said that detention pending bail is discretionary (RCWA 46.64.015), but is rarely used, even in connection with out-of-state motorists. (The Hart automobile carried Montana license plates.) All three defendants were willing and able to post bail. They were, however, taken to jail.

On cross examination Officer Chase explained why the other police were called:

> "A I effected the arrest, then called a—effected the stop; I advised radio that I was stopping a car at a certain location.
>
> "Q And within two or three minutes there were three cars there in addition to your car, is that not true?
>
> "A Yes, sir.
>
> "Q And was that because it was Neil Hart?

"A That would have had some bearing on it, maybe.

"Q Well, then, what was the purpose of the other three cars, or is it customary in King County to ask for assistance if you stop someone for a traffic violation at 36 miles per hour in a 20-mile zone?

"A If the defendant had been the same defendant, the request would have been made—the defendant Hart."

Officer Chase, on direct examination, explained the arrest of Krogness and Russell as follows:

"Q What did you do then?

"A I then walked up to the car and making sure that I would recognize either one or both of the defendants, I observed a hunting rifle in the rear seat.

"* * * * *

"Q Now, Sergeant Chase, after you observed that, what, if anything, did you then do?

"A I advised Mr. Hart that we were going to search his car at that time. Search was made, after seeing the rifle, with the anticipation of a game violation being committed."

On cross examination he gave this account:

"Q Did you take Krogness and Russell out of that car?

"A I told Krogness and Russell to sit in two separate patrol cars, yes.

"Q Then you placed them in custody at that point?

"A Yes.

"Q For what crime?

"A Aiding and abetting.

"Q Aiding and abetting what?

"A A traffic violation.

"Q The aiding and abetting of speeding?

"A Yes.

"* * * * *

"Q Now, you went into the suitcase in the trunk of the car?

"A Yes. The suitcase was opened.

"Q That looking for a game bird or a piece of deer?

"A Some game violation."

The trial court did not set forth specific findings of fact upon which its rulings were predictated. See *State v. Chinn*, supra and *Townsend v. Sain*, 372 US 293, 83 S Ct 745, 9 L Ed2d 770 (1963). Adequate findings are useful whenever constitutional issues are raised. Here the trial court published a written opinion in ruling on the motion to suppress. The opinion can fairly be construed as a finding that the officer made a lawful arrest for a traffic violation and thereafter searched

the automobile in the reasonable belief that there had been a recent violation of the Washington game laws.

Whether we take our standards from the federal Fourth Amendment (through the Fourteenth) or from our own constitution's Article I, § 9, both guarantee the people the right to be secure in their persons, houses, papers and effect. The basic principle is clear.

The principle has proved difficult of application. Because of the mobility of criminals and of their pursuers, and for other reasons, the search warrant is not commonly employed. See Einhorn, *The Exclusionary Rule in Operation—A Comparison of Illinois, California and Federal Law*, 50 J Crim L, C & P S 144, 151 (1959). Accordingly, most searches that are challenged in court are those which have at least a colorable foundation in an arrest of some kind. Liquor law enforcement historically produced comprehensive searches as "incidents" of traffic arrests. See, e.g., *State v. Christensen*, supra; *Brinegar v. United States*, 338 US 160, 69 S Ct 1302, 93 L Ed 1879 (1949); *Husty v. United States*, 282 US 694, 701, 51 S Ct 240, 75 L Ed 629, 74 ALR 1407 (1931); *Carroll v. United States*, 267 US 132, 149, 45 S Ct 280, 69 L Ed 543, 39 ALR 790 (1925); *Marsh v. United States*, 29 F2d 172 (2d Cir 1928). It may be questioned whether everything said in these cases would be given full effect today. If the arrest is illegal, then it can provide no legitimate foundation for a search. See *People v. Mickelson*, 30 Cal Reptr 18, 380 P2d 658 (1963).

Setting to one side cases like *State v. Hoover*, 219 Or 286, 347 P2d 69, 89 ALR2d 695 (1959), in which there is lawful arrest for a felony or dangerous misdemeanor and the accompanying search produces evidence of other crimes, we have before us the more common situation in which a minor traffic violation has called the attention of the police to a felon who might otherwise have gone his way unmolested. See, e.g., *People v. Lopez*, 32 Cal Reptr 424, 384 P2d 16 (1963): arrest for traffic violation; superficial inspection of automobile revealed burglars' tools; arrest for burglary; further search turned up evidence eventually used in conviction of first-degree murder.

Officer Chase properly stopped Hart's automobile for a speeding violation. Given a legal arrest for a traffic violation, we have the preliminary question: What kind of a search is reasonable as an incident of a traffic arrest?

Certainly an officer may, and for his own safety should, approach every law violator with caution and circumspection. Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 Calif L Rev 421, 429 (1929). Professor Collings observes that "[s]carcely a month passes in California without a news report of the murder of a police officer attempting to make a traffic or other arrest." In approaching a violator's automobile the officer clearly has the right to observe anything that would be in plain view and observable by passers by. The question becomes troublesome only when the officer, usually acting upon the kind of

intuition that comes from a policeman's experience, sees something that causes him to investigate a particular violator with more care than is routinely employed in handing out summonses to housewives and commuters. Police officers are not constitutional lawyers, and they do their dangerous work in the light of facts as they reasonably appear during the episode to which courts later are free to apply hindsight. Clearly a superficial examination of the automobile is not only reasonable, but is good police practice.

As a general rule, the search must be reasonably related to the offense which prompts the arrest. The search may not, therefore, involve the luggage and other interior compartments of the vehicle merely because there has been a traffic arrest. The following cases involved comprehensive searches that were not reasonably related to traffic arrests: *State v. Michaels*, 60 Wash2d 638, 374 P2d 989 (1962) (failure to signal for left turn; search produced gambling equipment); *Elliott et ux v. State*, 173 Tenn 203, 116 SW2d 1009 (1938) (reckless driving; search produced contraband liquor in trunk); *Courington v. State*, 74 So2d 652 (Fla 1954) (driving while drunk; intoxicating liquor found in trunk); *People v. Gonzales*, 356 Mich 247, 97 NW2d 16 (1959) (driving at night with only one headlight; concealable weapon found stuck in front seat.) *Cf. The People v Watkins*, 19 Ill2d 11, 166 NE2d 300 (1960) (arrest for parking too far from curb; discovery of "policy" paraphernalia upheld on other grounds); *People v. Blodgett*, 46 Cal2d

114, 293 P2d 57 (1956) (double-parking; marijuana found in seat cushions; arrest and search upheld because of "furtive" conduct).

The trial court properly concluded in the case at bar that the arrest for a traffic offense, of itself, provided no lawful occasion for a comprehensive search of the automobile. The court noted, however, that after the traffic arrest had been accomplished other facts came to light. The court found that these facts gave the police officer reason to believe that a game-law violation had been committed. The court then found that the officer had probable cause to make a search for evidence of such game-law violation. It is this finding of fact that controls this case.

Where the officer, without trespassing, sees contraband or other evidence reasonably causing him to believe that contraband is being transported or that some other crime is being committed in his presence, he may have probable cause to make an arrest for the newly discovered offense as well as for the traffic offense which initially brought the subject to the attention of the officer. In such a case, while there may be no distinct demarcation between the first and second arrests, there does exist, prior to any extensive search, a probable-cause foundation for an arrest for an offense more serious than a traffic violation. The officer then is justified in making such a search as may be commensurate with the gravity of the newly discovered situation. Probable cause to arrest for the more serious offense, when

present, will answer constitutional objection to the rigor of the ensuing search. A fairly comprehensive search is a proper incident of an arrest for a game violation even though its "incidentalness" may be one step removed from the original traffic offense.

The situation is somewhat analogous to that in which some minor offense becomes the opening wedge for an officer's discovery of a new crime. But this development must occur lawfully. Intervening probable cause to arrest for a serious offense, if it came about in a legitimate manner, can make legitimate a search that would have been unreasonable if undertaken as an "incident" of the traffic arrest alone. See *People v. Lopez*, supra. Under the peculiar circumstances of the *Lopez* case, the result perhaps could have been reached without the aid of the California rule that permits police officers in certain circumstances to "frisk" suspicious persons without probable cause to make any arrest. (The rationale of the California rule which calls short-term detention for questioning and "frisking" something less than an arrest may be found in *People v. Mickelson*, 30 Cal Reptr 18, 380 P2d 658 (1963). The attempt to achieve a tolerable "middle ground" between freewheeling police oppression as an impossible choice on the one hand and the strict requirement of probable cause to arrest as a precondition of the right to search on the other hand is defended in Professor Collings' article cited supra.

It has been suggested that probable cause to search need not be the same as probable cause to arrest. We

believe, however, that the spirit of the constitutional proscription against unreasonable searches requires the same degree of good-faith belief in the guilt of a suspect to justify a search of his person or of his effects as would be required to support his arrest or an application for a warrant to search his home. As a practical matter, it is difficult to explain how the police can search an individual without arresting him, since any substantial detention without his consent would fit the definition of an arrest found in such criminal cases as *State v. Christensen*, 151 Or 529, supra, and such civil cases as *Lukas v. J. C. Penney Co.*, 233 Or 345, 378 P2d 717 (1963). If there is sufficient cause, as a matter of law, to justify whatever arrest is necessary physically to make a search then a reasonable search is a lawful incident of such an arrest. If there is not probable cause to arrest, there is no logical basis for saying that one may nevertheless be arrested on suspicion and detained long enough for the officers to search him to satisfy themselves that he is indeed as innocent as the law presumes him to be. We need not decide in this case the constitutionality of the game laws that purport to authorize certain searches of a kind that are not involved in the case at bar. Some of the seasonal and regional practices of game wardens may be covered by consent, express or implied, but such matters are not presented in the case of a roadside arrest admittedly made for traffic purposes.

In the case at bar, we must decide whether the trial court had before it any substantial evidence to support

a finding that there was probable cause to believe contraband was present in the automobile. The factual question before the trial court was whether the police officer, on the facts he described, had a good-faith belief, as well as reasonable grounds to believe, that the three young men he had stopped were, in fact, returning from a poaching expedition. If there was evidence from which the trial court could have drawn the inference that was drawn, there is no need for us to speculate whether, upon the same record, this court necessarily would draw the same inferences. Where findings of fact have substantial support in the evidence, this court ordinarily does not retry facts which may underlie trial court rulings on the admissibility of evidence.

Officer Chase was an ex-officio game warden. He said that when he saw the rifle he thought he might find evidence of a game violation. Under RCWA 77.12.090, if that statute is constitutional, an officer is authorized to "search without warrant, any conveyance, vehicle, game bag, game basket, * * * or other similar place which he has reason to believe contains evidence of violations of law or rules and regulations of the commission." We assume that in Washington "reason to believe" means "probable cause to believe." We do not deem it either necessary or proper to "declare" the quoted statute unconstitutional. We have a similar statute in Oregon. ORS 496.660. We leave open the question whether such a statute would be upheld if it were to be construed as permitting a search upon mere sus-

picion. We do not so construe the Washington statute. There must be probable cause to believe a given offense has been committed (transportation of contraband) before there can be a search for evidence of it. In Oregon, probable cause "has been defined as the existence of such circumstances which would lead a reasonably prudent man to believe in the guilt of the accused * * *." *State v. Duffy et al.*, 135 Or 290, 301, 295 P 953 (1931). Compare *State v. Leadbetter*, 210 Wis 327, 246 NW 443 (1933), and *State v. Johnson*, 210 Wis 334, 246 NW 446 (1933).

Probable cause to believe that a vehicle is transporting contraband, and is therefore subject to search for such contraband, has been explained thus:

> "* * * This is to say that the facts and circumstances within their knowledge and of which * * * [the officers] had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Carroll v. United States*, 267 US 132, 162, 45 S Ct 280, 69 L Ed 543, 39 ALR 790 (1925).

The trial judge's implied finding that the officer acted upon probable cause to believe that contraband game animals or birds were being transported in the Hart automobile is sufficient to support the challenged ruling unless we can say as a matter of law that the finding is unsupported by substantial evidence. In other words, where there is conflicting evidence, all testi-

monial conflicts, choices of permissible inferences, and conclusions to be drawn therefrom, are resolved by the trial court's ruling, so long as it appears that the trial court employed constitutional standards in applying the law. See *Stein v. New York*, 346 US 156, 73 S Ct 1077, 97 L Ed 1522 (1953). The finding must not, however, be wholly lacking in support in the evidence. See *Townsend v. Sain*, 372 US 293, supra.

It is clear from the trial court's opinion that the trial court did apply correct constitutional standards. The court stated that the officer relied upon the presence of the rifle, equipped as it was with a telescope sight, together with the known petty-offense records and the behavior of the occupants of the automobile, in arriving at the belief that if he searched further, he would find proof of a game violation. The court observed the witnesses and heard their testimony. We cannot say, as a matter of law, that no reasonable man would have had probable cause to believe that the vehicle contained contraband game.

When the whole of the testimony is read, the defendants point out, a contrary inference is also supportable by the evidence. One could believe that the police officers suspected that where Hart and Krogness, known to them to be petty hoodlums, and a third man, unknown to them, were together in an automobile, they were up to no good. It could be inferred also that the officers upon mere suspicion undertook an exploratory search and then found proof of a recent burglary. The defense

argues that only when the search was challenged on constitutional grounds did it occure to the officers that there may have been some connection between the rifle which they had observed and a possible game violation. Whatever may be said for the defense argument, it ignores the fact that the trial judge believed the police officers, confused though they were, at times, on the witness stand.

We are not prepared to hold that the police may search an automobile for evidence of a game-law violation any time they observe a rifle in the vehicle. Any such rule would be easy to abuse. It would put the decision to search or not to search virtually within the uncontrolled discretion of the police. That is exactly what the Fourth Amendment was intended to prevent.

We do hold, however, that where a trial court, employing proper constitutional standards, finds as a matter of fact that the officer making the search acted upon facts that would create in a reasonable mind a belief that there was a game violation, then this court will not try the case *de novo* to see if some other interpretation of the facts can be supported.

Once the search for illegal game uncovered the implements and fruits of another crime, it was reasonable for the police officers to believe that an offense more serious than a game-law violation had been committed, e.g., receiving and concealing stolen property, or burglary, or ex-convicts in possession of concealed weapons

(pistols). The officers at that point were under no duty to release their prisoners until such time as an investigation would reveal exactly what place had been the victim of a burglary, or exactly whose property had been stolen.

Where a legal arrest is made for a traffic offense, and a lawful search based upon probable cause to believe there has been a game violation thereafter uncovers evidence of another crime, the evidence can lawfully be used to prove the crime thus discovered. See *Church v. State*, 206 Tenn 336, 333 SW2d 799 (1959); *Goodwin v. State*, 148 Tenn 682, 257 SW 79 (1923).

If an officer lawfully examines the trunk of an automobile and finds therein a bullet-riddled human body, the officer need not decide, on peril of voiding a future prosecution, whether to arrest the driver of the automobile for murder (ORS 163.010) or for transporting a body without a permit from the state board of health (ORS 432.340). It is reasonable for the officer in such a case to assume that a serious offense of some kind is being committed, or has been committed, and it is reasonable for him to seek to preserve the *status quo* until some reasonable questions have been answered. See Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L J 319, 331 (1962).

Whether the Washington police officers later followed correct procedure in booking the prisoners at the jail is not a material question in this case. The search was

legals when it was made. It is sufficient for the purposes of this case that the search was not unlawful. The articles seized were, accordingly, subject to seizure without a warrant. The fact that the circumstances developed as they did to give the officers probable cause to believe crimes other than speeding were being committed did not make the original stopping of the car illegal. The orginial arrest was clearly in good faith, and was in no sense a pretext for an exploratory search.

All three defendants were equally caught up in the events that flowed from the original arrest of Hart. As there was nothing illegal about the arrest of Hart, nor in the search of his auto, we need not inquire into the irregularities, if any, that may have made the incidental detention of Krogness and Russell subject to some formal criticism.

The only other assignment of error contends that the the jury, rather than the judge, should have passed upon the legality of the search. The question of probable cause to arrest and the reasonableness of the search which followed the arrest were properly decided by the court. *Steel v. United States* No. 2, 267 US 505, 511, 45 S Ct 417, 69 L Ed 761 (1925). The authorities cited by the defendants do not support their theory that those questions were for the jury.

Affirmed.

APPENDIX C

Dissenting Opinion in the Supreme Court of Oregon

O'CONNELL, J., dissenting.

As in *State v. Chinn*, 231 Or 259, 373 P2d 402 (1962) again this court, finding a quite obviously guilty defendant, fashions the law of search and seizure to fit his conviction.

Even making the most generous concession to the prosecution in appraising the evidence of probable cause for the search, it is patent from the record that the search in this case was not made as an incident to an arrest for a violation of the game laws. It was necessary for the state to relate the search to the game violation because there was no other basis for arguing that the search was incident to an arrest; it was not incident to the traffic violation nor to the crime for which defendant was ultimately convicted.

From the testimony in this case one gets the distinct impression that the police officers suspected that defendant and his cohorts had been involved in a more serious crime and that the search was made to find evidence of that crime. Chase knew Hart. Hart had a previous record. It was not unlikely that Chase's call to the other officers for assistance was prompted by his knowledge of Hart's previous record. Normally there would be no need to call for assistance if the only crime involved was a game violation.

Before looking at Chase's testimony, it should be noted that probable cause must be made out in the present case mainly from the fact that the defendant and his companion were near a hunting area; that a gun with a telescopic sight was in the car, and that the arresting officer knew that Hart had a previous record. It must be admitted that from these facts an inference can be drawn that defendant had violated the game laws. But the law of search is not satisfied simply by finding that an inference can be drawn. The state has no right to search unless the inference is strong enough to move from the level of suspicion to the level of probable cause. This is fundamentally a question of relevancy. The greater the number of possible inferences flowing from the facts, the less relevant is any one conclusion reached upon the basis of such facts. In the present case the probability that defendant used the gun to hunt illegally is weakened by the fact that the car was travelling away from a metropolitan area and not away from a hunting area. The only facts supporting the inference that defendants may have violated the game laws were (1) that there was a hunting area nearby and (2) that the gun was equipped with a telescopic sight, and possibly (3) that defendant had a previous record which fact was known to the arresting officer. This is a weak structure of facts upon which to rest an inference that a game violation had occurred. At most, the circumstances are sufficient only to create suspicion.

The cases from other jurisdictions are not very helpful. What appears as mere suspicions to one court is probable cause to another. Generally the difference in point of view reflects the difference in the court's understanding of the meaning of the Fourth Amendment and its counterpart in state constitutions. If the constitutional proscription against search and seizure is regarded simply as the pronouncement of a tort principle protecting the citizen's right of privacy, the right to search can be extended to the broadest limits. The problem then becomes one of weighing the citizen's interest in being free from annoyance against the state's interest in the efficient administration of the criminal law. So viewed, the only limitation that needs to be placed upon the right to search is at the point where the resulting annoyance is more than the average person should be expected to bear as a part of the price to be paid in helping to enforce the criminal law.

But the Fourth Amendment is not just a shoddy piece of tort law. The prohibition against unreasonable search and seizure was incorporated into the constitution to fend against a danger which went to the very core of the structure of government: the danger of an ambitious executive using police action to suppress his opposition. The chaos in the law of search and seizuer stems in part from the failure of the courts to see this larger purpose in the Fourth Amendment. However, sometimes it is seen clearly, as in Mr. Justice Murphy's

dissent in *Harris v. United States*, 331 US 145, 194, 67 S Ct 1098, 91 L Ed 1399 (1947):

> "* * * The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders * * *. History is not without examples of the outlawry of certain political, religious and economic beliefs and the relentless prosecution of those who dare to entertain such beliefs. And history has a way of repeating itself. It therefore takes no stretch of the imagination to picture law enforcement officers arresting those accused of believing, writing or speaking that which is proscribed, accompanied by a thorough ransacking of their homes as an 'incident' to an arrest in an effort to uncover 'anything' of a seditious nature. Under the Court's decision, the Fourth Amendment no longer stands as a bar to such tyranny and oppression."

As is pointed out in a note, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U Chi L Rev 664, 700 (1961):

> "It is clear that the danger to which Mr. Justice Murphy referred is not simply that of over-bearing police in an otherwise democratic society. Rather, he warns that the availability of broad police powers will encourage, or at least provide no hedge against, the deterioration of the political order itself. Mr. Justice Frankfurter spoke in much the same vein in his dissent in Harris: 'How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest?

> * * * Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature.' (331 US at 163)"[1]

When the law of search and seizure is seen in this larger matrix the scope of permissible search is severely limited. The line between suspicion and probable cause is then drawn with an eye to the purpose of the Fourth Amendment, and not simply to the exigencies of police administration in the particular case.

The law prohibits a purely exploratory search. That is what we have in the present case.

Cases in other jurisdictions have held that probable cause was lacking where the facts more clearly pointed to the commission of a crime. *State v. Johnson*, 210 Wis 334, 246 NW 446 (1933) is such a case. There the defendant, a game warden, was charged with criminal assault and battery upon one, Jossart, alleged to have been committed in connection with a search of Jossart's

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[1] The comment continues:

"* * * Davis v. United States evoked similar warnings: 'It is not only under Nazi rule that police excesses are inimical to freedom . . . History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.' [328 US 582, 597 (1946) (Frankfurter, J., dissenting)]. The latter passage might seem to suggest that the danger to be avoided is the 'slow erosion of all traditional liberties. If this were the crux of the problem the fourth amendment would not be properly viewed as a special 'bar to such tyranny and oppression.' A careful reading of the passages indicates, however, a theory of unique relation between broad powers of search and seizure and the rise of a totalitarian state. Totalitarian regimes may be characterized, in part, by the types of offenses with which they are most concerned: sedition, heresy, unpopular thought, disapproved literature. These are all 'victimless crimes,' or at least crimes of which the government is the only victim. Search and seizure procedures are uniquely suited—perhaps indispensable—to the detection of just such crimes. It is reasonable to suppose, therefore, that strict controls on the right of search and seizure would provide one hedge against the kind of oppressive law which only such procedures could make enforceable."

automobile. Defendant contended that he had probable cause to believe that Jossart and his companions were in possession of the carcass of a deer in violation of the law. The following facts were stipulated. The search occurred on an old logging road in unsettled territory, except for shacks of hunters and fishermen. Jossart and his companions were returning from the vicinity of a hunting camp. They were clad in hunting clothes. Defendant saw on the back seat of the car a rifle and a sack. He also noticed a "Christmas" tree which was off the floor, level with the seat "as though there was something under it.' This made the defendant "suspicious as to what might be under the tree." (210 Wis at 335, 246 NW at 446). Jossart had been previously convicted of the violation of the game laws. It was held that defendant did not have probable cause to believe that the complaining witnesses were violating the game laws. Chief Justice Rosenberry, speaking for the court, said:

> "* * * Here the defendant in his testimony properly characterized the legal effect of such knowledge as he had. It aroused a suspicion. Facts which warrant nothing but a suspicion are not sufficient to justify an officer in believing that an offense is probably being committed. No one had seen Jossart and his companions hunting nor had any reason to suppose that they were engaged in any violation of the law except that they were coming out of an unsettled section of the country with a Christmas tree in the back of the car which might conceal the presence of contraband game and that a rifle was being carried in the car.

> "It is considered that the trial court correctly held that the defendant did not have probable cause to believe the occupants of the automobile were in the act of committing an offense which would warrant him making a search of the car against the protestations of its occupants." 246 NW at 446-447.

Other illustrative cases are set out in the margin.[2]

Even if we were to accept the view that the facts in the case at bar were sufficient to create in an arresting officer a belief that the game laws had been violated, the tenor of officer Chases's testimony strongly suggests that the search was not made as an incident to a game violation. Chase recognized Hart and defendant Krogness. Apparently Chase knew that they had a previous record. He called on his car radio for assistance. Two or three cars came to his assistance. Finally at the scene of the arrest there were, in addition to Chase, detective Heller and his partner, officer McCole, a juvenile officer in the area, officer Langlois, officer Rose, and two patrolmen. All of these converged upon the scene of an arrest for a traffic violation or a possible game violation.

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[2] The People v. DeLuca, 343 Ill 269, 175 NE 370 (1931) (officers in search of game violator boarded passenger tram which the defendant was riding. The officers saw some feathers sticking out of defendant's pocket, searched his person and found four hen pheasants in his coat pocket. Held that the evidence was obtained by unlawful search); State v. Gibbs, 27 Wis 227, 31 NW2d 143 (1948) (prosecution for possession of shotgun shells loaded with ball or heavy shot. Defendant was wearing tight-fitting bibless overalls and game warden could see outline of shotgun shells in defendant's pockets. Defendant brought out shells from his right pocket, but refused to produce shells from his left pocket. Arrest and search held illegal.)

Cf. State v. Evans, 143 Or 603, 22 P2d 496 (1933); Hughes v. State, 195 Tenn 290, 259 SW2d 527 (1953); Phillips v. State, 159 Tex Cr 286, 263 SW2d 159 (1953); State v. Leadbetter, 210 Wis 327, 246 NW 413 (1933)

To get the full sense of the shallowness of the state's position in attempting to tie the search to the game violation, it is necessary to read the entire testimony of officer Chase. I shall not set it out in full here but a few passages from the transcript will illustrate the strained effort to distill probable cause out of a fact situation very nearly dry of inference-making material. First as to the arrest, officer Chase gives the following explanation:

> "Q Now, on what charge had you taken him [Hart] into custody?
>
> "A For arresting him on a traffic violation.
>
> "Q You're not allowed to take him into custody on a traffic violation in the state of Washington, are you?
>
> "A Oh, yes, sir, very definitely.
>
> "Q Well, now, let me read you the statute of the State of Washington and ask—well, I'll put it this way: Are you not acquainted with the fact that in the State of Washington a police officer may not take a person into custody for a traffic violation unless that person refuses or fails to sign an arrest citation agreeing to return at the time fixed in the citation?
>
> "A As I am acquainted with the traffic laws of the State of Washington, the only thing that—to my knowledge this is a courtesy given to any citizen in the state; out of the state makes quite a difference. This is a courtesy that we give to the residents by not booking them in jail; we have them sign an arrest citation, a promissory not to appear. This is not a prerequisite. We may any time take

a person to the county jail, write the ticket and have him post his bail there.

"* * * * *

"Q * * * Now, sir, directing your attention to this [referring to the Washington statute]: 'Upon the arrested person's failing or refusing to sign such written promise, he may be taken into custody of such arresting officer and so remain or be placed in confinement.' Your view was to the contrary, is that so?

"A My view is that this is a courtesy extended to the people. My view does not say that has—or the book does not say that this has to be done, does it?

"* * * * *

"A The man has committed a misdeameanor in my presence, a traffic misdemeanor; he can be booked in the King County jail.

"Q Did he fail or refuse to sign the written promise?

"A No sir. He was driving a Montana licensed car; he was an out-of-state person so that's why he was booked in the King County jail, to post bail.

"* * * * *

"Q Is it customary when you arrest a traffic violator for going 36 miles per hour in a 20-mile zone to call for assistance at eleven o'clock in the morning?

"A. In the event the defendant would have been the same defendant, yes.

"Q Well, did you know who was driving that automobile?

"A I saw him when he stepped out of the car.

"Q Well, but--

"A That's when I requested additional help.

"Q You didn't call for additional help previous to that time?

"A No.

"Q You are sure of that?

"A I effected the arrest, then called a—effected the stop; I advised radio that I was stopping a car at a certain location.

"Q And within two or three minutes there were three cars there in addition to your car, is that not true?

"A. Yes, sir.

"Q And was that because it was Neil Hart?

"A That would have had some bearing on it maybe.

"Q Well, then, what was the purpose of the other three cars, or is it customary in King County to ask for assistance if you stop someone for a traffic violation at 36 miles per hour in a 20-mile zone?

"A If the defendant had been the same defendant, the request would have been made—the defendant Hart.

Officer Chase's explanation for the arrest of Krogness and Russell is interesting:

"Q Did you take Krogness and Russell out of that car?

"A I told Krogness and Russell to sit in two separate patrol cars, yes.

"Q Then you placed them in custody at that point?"

"A Yes.

"Q For what crime?

"A Aiding and abetting.

"Q Aiding and abetting what?

"A A traffic violation.

"Q The aiding and abetting of speeding?

"A Yes.

"Q And how did they aid and abet speeding?

"A Well, maybe they could have told the driver to be a little more cautious.

"Q. They could have—maybe they could have told the driver to be a little more cautious; is that what you said?

"A That's what I said.

"Q And that was the basis of your charge to them upon which you took them into custody, that they might have told the driver to be a little more cautious and you overheard the fact that they did not do so, is that correct?

"A No, I didn't overhear anything.

"Q How did you know they didn't do that?

"A I did not know whether they had or had not.

"Q You didn't know it?

"A No.

"Q But you were arresting them for it anyhow, is that correct?

"A They were arrested, yes.

"* * * *

"Q (By Lonergan) Now, the vehicle was impounded, you stated. Was that on arrest for the traffic violation of going 36 miles an hour and aiding and abetting by not telling him to slow down and be cautious?

"A The vehicle was impounded on the traffic violation. This was the case number that the vehicle was given by the towing company as well as our office.

"* * * * *

"Q (By Mr. Bernstein) Is this the first time that you ever effected an arrest for aiding and abetting by taking into custody two passengers in an automobile or any nuumber of passengers other than a driver for aiding and abetting in a traffic violation?

"A. No, sir.

"Q This is a customary procedure of the King County Sheriff's Office?

"A This has been done on frequent occasions depending on how—the seriousness of the offenses.

"Q Well, I realize that driving past a school is a serious offense—I'm not belittling that at all—but is this the first time that you ever took two other individuals in custody for having been passengers

in a car that travelled 36 miles an hour in a 20-mile zone?

"A Well, to—this is the first time I have ever arrested for aiding and abetting any defendants for going 36 miles an hour in a school zone.

"Q Is it the first time?

"A Yes, for going 36 miles an hour in a 20-mile school zone.

"Q And have you on previous occasions arrested for going 37 or 40 miles an hour, taking in—have you ever arrested—I'll withdraw the previous question. Have you ever arrested anyone previous to this incident for aiding and abetting a driver exceeding the speed limit in excess of that posted by law?

"A Speed limit in the state of Washington in most places on the highway is 60 miles an hour.

"Q The lawful speed limit, whatever the area may be?

"A Yes, I have arrested other defendants for aiding and abetting.

"Q For a traffic violation?

"A For traffic violations.

"Q For exceeding the speed limit?

"A For exceeding the speed limit.

"Q And have you taken them into custody—

"A And booked them in the King County jail.

"Q And have you searched their person and their car?

"MR. COURSON: I'm going to object to that, your Honor.

"THE COURT: The objection will be sustained.

Chase's basis for making the search was explained as follows:

"Q. * * * Now, if I might take a look at this exhibit, P. I see it has on its breach, 'Carl Gustavus' —If I may remove the matter that is blocking my view—'gevarsaktori.' Do you refer to this as a hunting rifle? Is this not, in fact, a military rifle of the Swedish armed forces?

"A I believe the rifle has been modified, sir.

"Q Was it not—does it not bear upon it the fact that it was produced as a weapon by the State Arsenal of Sweden as a military weapon produced in 1906 by the military arsenal, is that not correct?

"A You may be correct, counsel, but I didn't observe that on the rifle.

"Q. Now, Mr. Chase, when you searched through this car, what did you search for?

"A A game violation.

"Q Oh, no, Mr. Chase, you searched for something?

"A A bird.

"Q You searched for a bird?

"A A part of a deer.

"Q A part of a deer. Did you find a bird or a part of a deer?

"A No, we did not, sir.

"Q What sort of bird did you think was shot with this weapon that's produced by the Military Arsenal of the Swedish—of Sweden?

"* * * * *

"A I didn't have any idea what kind of a bird the defendant would like to shoot.

"Q You didn't have any idea what possible bird it could be, is that right?

"A Oh, I imagine there would be some bird that you could shoot with the gun.

"* * * * *

"Q Now, you went into the suitcase in the trunk of the car?

"A Yes. The suitcase was opened.

"Q That looking for a game bird or a piece of deer?

"A Some game violation.

The foregoing testimony taken as a whole demonstrates to me that the police made an exploratory search and when called upon to justify it attempted to relate it to a violation which had not occured to them at the time of the arrest.

I believe that the majority opinion is in error in another respect. It states:

"In the case at bar, we must decide whether the trial court had before it any substantial evidence to support a finding that there was probable cause to

> believe contraband was present in the automobile. The factual question before the trial court was whether the police officer on the facts he described, had a good-faith belief, as well as reasonable grounds to believe, that the three young men he had stopped were, in fact, returning from a poaching expedition. If there was evidence from which the trial court could have drawn the inference that was drawn, there is no need for us to speculate whether, upon the same record, this court necessarily would draw the same inferences. Where findings of fact have substantial support in the evidence, this court ordinarily does not retry facts which may underlie trial court rulings on the admissibility of evidence."

According to the majority's analysis probable cause is a question of fact which is to be resolved by the trial judge as a trier of fact. This is erroneous. If there is no conflict in the evidence as to what occurred in making the search, the question of the existence of probable cause is for the court. If the evidence is in conflict there is, then, a mixed question of law and fact. The correct analysis is found in 4 Wharton's Criminal Law and Procedure (Anderson ed) § 1545, p. 167 (1957):

> "Probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it actually existed is a matter of fact, but whether, supposing them to be true, they amount to probable cause is a question of law."

In the present case the facts are not in dispute; the only question is whether the admitted facts add up to probable cause. That is purely a legal question which

we have the responsibility of answering irrespective of the trial judge's view of the matter. It is for us to set the standard for a valid search. That standard must be put at a level which will meet the constitutional guarantee against unreasonable search.

As I have already indicated, the majority and I do not agree where that standard should be set. But wherever it is set we and not the trial judge have the ultimate responsibility for setting it.

The evidence should have been suppressed. Defendants are entitled to a new trial.

APPENDIX D

Agreed Narrative Statement — method of raising questions in Circuit Court.

Prior to trial, each defendant moved to suppress and return certain evidence, which motions are contained in the trial court file. Each defendant desired to offer his testimony and the testimony of the King County, Washington police officers at the scene of the arrests, searches and seizures in King County, Washington, but the Court declined to take evidence but in lieu of testimony heard the motion on the transcript of evidence taken on the preliminary examination of defendants on the charge which resulted in this indictment, which transcript is submitted herewith, and on that basis denied the motions. The court, however, advised that the defendants could renew the motions and offer evidence thereon on the trial.

At the opening of the trial, each defendant renewed these motions and asked to offer evidence thereon. The court directed that the trial proceed and the evidence on said motions would be taken as part of the trial of the case. The case then proceeded in the ordinary way, the State giving its opening statement and the defendants giving their opening statements to the jury, which statement of defendants was addressed to the unreasonable nature of their arrests, searches and seizures as aforesaid, and the evidence on both sides was offered in the presence of the jury.

At the time of the offer in evidence by the State of the evidence obtained by or resulting from the aforesaid

arrests, searches and seizures by the King County, Washington police officers, each defendant objected thereto on the ground that said material, and all knowledge therefor, was obtained by reason of an unlawful search of a 1959 Ford automobile in which defendants were lawfully present, and from the person of defendant Russell, and by the unlawful seizure from him of said Exhibit belonging to him, as the result of an unla ful search and seizure on or about March 8, 1962, in King County, Washington, by police officers of the State of Washington, to wit, Deputy Sheriffs John Harwell, Ronald Moore, Frank Chase and others whose names are unknown to defendants; on the ground that said search and seizure was made without warrant issued in accordance with law and was not made with the consent of accused, or any of them; was not incident to a lawful arrest, or within the confines of a search permitted by lawful arrest; was without probable cause to believe the material there existed for which seizure was lawful, was undertaken by virtue of a statute of the State of Washington, to wit, Section 77.12090, Revised Statutes of the State of Washington, that said statute is in violation of the Due Process and Equal Protection Section, Section I, Fifth Amendment, United States Constitution, and that said arrest and confinement of the defendant Hart in no way gave any authority to arrest and confine the defendants Krogness and Russell, or to seize this Exhibit from the defendant Russell, and the arrest of the defendant Hart, on a traffic violation,

gave no such authority to the subsequent arrest of all of the accused on an open charge and was in violation of Section I of the Fourteenth Amendment of the United States Constitution; that the search and seizure of any material as incident to said arrest and confinement on an open charge was likewise in violation of the said part of the United States Constitution; that the seizure of all of the material set forth in inventory, presented by the prosecution, offered here as Defendants' Exhibit 1, for identification, was beyond the authority given by law and contrary to the provision of said United States constitutional provision; that it was beyond and unreasonable as being beyond the authority of any lawful arrest set forth; that the subsequent taking, the subsequent taking of any material, such as Exhibit I, was taken as a result of the aforesaid searches, seizures and arrests, all of which are unlawful, as set forth previously, and are the fruits of the poison tree; that is my understanding that this motion, made as to this objection, made as to this particular Exhibit I, will be considered to apply to each and every item of evidence offered as a result of the aforesaid searches, seizures from the said automobile, or the persons of the accused, and to apply to each of them; that the defendants are not allowed to present evidence upon the State's case or in opposition of the offer in evidence or preliminary cross examination to raise again the question of admissibility, that that matter is precluded by the determination of the Court on the Motion to Suppress; that none of this

material is seized as a fruit of the crime or instrument of the crime for which the accused were stopped, searched or arrested by the Washington officers, and all are the fruits of said unlawful searches, seizures and arrests in violation of the United States Constitution and Constitution of the State of Oregon, to wit, Section I, Fourteenth Amendment of the United States Constitution, Due Process and Equal Protection Clauses, and Article I, Section 9 to 20, of the Oregon Constitution; as the unreasonable search and seizure, due process provision, and that Section 1, Fourteenth Amendment is referred to as embodying the Fourth Amendment of the United States Constitution.

The court overruled this objection and the offered evidence was admitted subject to being stricken by the court at the end of the case.

The evidence taken on this subject is set forth in the filed transcript of evidence and the items seized in the annexed inventories.

At the end of the State's case, the defendants asked to put on their evidence as to lawfulness of the arrests, searches and seizures.

> "MR. LONERGAN: Now, your Honor, we would like to take the opportunity to put on testimony limited to the lawful search and seizure at this time. I would assume that it may very well raise the question for the ultimate determination of the jury; that is, your Honor may do that, and it was our feeling that under those circumstances we should offer that testimony in the presence of the jury.

THE COURT: It is your feeling what? I did not get the last part of your statement.

MR. LONERGAN: That we should offer our testimony on this question in the presence of the jury, to your Honor as well as to the jury, because you may determine to send that question to the jury.

THE COURT: Well, I would have assumed that it would go to the jury. Whatever you have would be presented in the course of your defense; that is, I think it would have to meet the tests of relevancy and materiality and competency and so on just as other defense testimony would be, or in rebuttal. I perhaps do not quite understand your position.

MR. LONERGAN: We were trying now to keep our evidence separated, so that now we would offer the evidence on the motion to suppress that we will renew before your Honor at the termination of that testimony.

THE COURT: It is not that you are not going to make any such designation to the jury, but you just want to put on the evidence now and then perhaps have a recess or something of that kind, is that what you have in mind?

MR. LONERGAN: Yes, your Honor.

MR. BERNSTEIN: So that we can ask your Honor's reconsideration, since now it will be on evidence rather than on the transcript.

(Further discussion.)

THE COURT: I feel that the matter should be presented right along with the rest of the defense because it, even though the Court should determine that there would be some special verdict

in respect to this particular matter from the evidence as presented for the jury to determine, it would be determined as I see it now in connection with all of the matters of the trial, that we would not have any separate determination by the jury prior to going on with the rest of the case. I think it should all be determined at one time, and I think there will be no difficulty about it, so I think we should go ahead with the usual course.

MR. BARROWS: If it please the Court, do I understand the Court is going to submit the question of the admissibility of the search to the jury?

THE COURT: Of what? Oh, well, I could not tell you that at this time. It is a matter that I have not yet determined until I hear whatever the evidence is and whether it presents a question of fact or a question of law."

At the end of the case, each defendant moved, and the court ruled as follows:

"MR. LONERGAN: Each of the accused, individually, moves for a directed verdict of acquittal and, coincidental therefor and connected therewith, the suppression and removal from the case of all evidence and knowledge obtained by virtue of the search and seizure in Washington, as heretofore detailed, or by a search, or by a seizure, as detailed and, particularly, to strike from the cas each of the following exhibits and the testimony thereto, except as it shows the unlawfulness of the search, to wit: Exhibits I, N, B, Q, Y, S, AA, BB, CC, DD, EE, FF, JJ, LL, MM, NN, PP, QQ, on the ground and for the reason that at the present time it appears from the testimony of the State's witnesses that the search, both of the automobile and of each of the accused, was made by virtue of a

traffic arrest of speeding for which a search for evidence is not permissible and for which seizure is not permissible and, for the further ground, that the arrest of the accused, Krogness and Russell, was admittedly without basis, for Mr. Chase testified, in addition, that he was arresting them for aiding and abetting the traffic offense of speeding by failure to advise Hart to be more cautious, and then he admitted that he did not know whether they had advised him to be more cautious.

Furthermore, that the evidence shows no other reasonable basis for search, search without consent, a search without a warrant, a search by virtue of a claimed game violation was a conclusion and a subterfuge; that the seizure under these headings was likewise invalid for the same reason and also because of the fact the seizure went beyond any evidence of crime which was within their knowledge and so the seizure was then invalid; that the statute of Washington under which they seek to justify as to game law violation is unconstitutional in that it violates the Fourteenth Amendment of the Constitution of the United States and the Fourth Amendment as part of the due process clause, there being no lawful right to take them into custody, in any event, by Washington law, even of the accused Hart; that all placing in custody was invalid and therefore all searches and seizures incident thereto were invalid, in violation of the sections set forth and that the exclusionary rule is a requirement by virtue of the United States Constitution, as has been heretofore set forth, and, by virtue of this, there is insufficient evidence to go to the jury upon which to found a verdict of guilty, and by decisions of the Supreme Court thereunder. Thank you, your Honor.

THE COURT: This was a combined motion, I assume, or, at least a —

MR. LONERGAN: Made of each.

THE COURT: — motion for directed verdict and a motion—well, I wonder, did you intend to combine them together, or have you made two separate motions and which one do you want to be considered first?

MR. LONERGAN: I would say they were intended to be made in the alternative—

THE COURT: First you moved for,—

MR. LONERGAN: — striking and suppressing — a renewal of our motion involved there, based now on the evidence as it appears, and I have marked for identification the one, three and four of the inventories furnished me by the prosecution for consideration of the Court on the motions, and then, as a result thereof, or, in the alternative, for a motion for an acquittal based upon the fact of the insufficiency of lawful evidence which a conviction could be attained. Is that right, John?

MR. KOTTKAMP: Yes. Let me restate this and see that our thinking is altogether. All of the defendants have, first, joined in the motion stated by Mr. Lonergan to exclude those exhibits which he enumerated, for the reasons which he enumerated —

MR. LONERGAN: And the evidence, the oral evidence of the witnesses.

MR. KOTTKAMP: —and oral witnesses, except with respect to the search and seizure in connection therewith—

MR. LONERGAN: Except showing the unlawfulness of it.

MR. KOTTKAMP: Except showing the unlawfulness of the search and seizure. In the alternative, the three defendants joined in a motion, separately, on behalf of each as well as all three together, for an acquittal, for the reasons as enumerated by Mr. Lonergan. Further, in the alternative, I take it he stated defendants Krogness and Russell again move for an acquittal based upon an additional ground of invalidity of the arrest, for the reason stated by Mr. Lonergan—

MR. LONERGAN: And Hart also violated by virtue of the invalidity of the arrest for traffic violation, invalidity of taking him into custody on traffic violation—

MR. BERNSTEIN: And search.

MR. LONERGAN: Search and seizure resulting therefrom.

(Further discussion.)

THE COURT: In respect to this proposition, I mean, I am speaking about the overall rule in respect to search and seizure, and I think under all the rules as I understand them and the evidence in this case, that the question of whether this had been a valid search and seizure, at this time is not for the jury.

(Further discussion.)

THE COURT: Now, I have ruled upon the motion that you have made. Now, inasmuch as I understand it now, in the alternative I do not know which is which you have moved for—perhaps the alternative was just an addition—in any event, you moved for a directed verdict—are you still moving for a directed verdict of acquittal?

MR. LONERGAN: Yes, but on the basis—you really decided that. You might as well make

the decision on that, but you have really indicated what it would be.

THE COURT: Well, the motion for directed verdict of acquittal will also be denied."

Each of the defendants requested that the Court submit the questions of fact as to the reasonableness of the aforesaid arrests, searches and seizures to the jury and specifically requested the following instructions:

DEFENDANTS' REQUESTED INSTRUCTION No. 6

If any of the material admitted into evidence either belonged to the defendants or one of them, or was taken from the possession or custody of any of them you must then determine if such evidence was obtained in violation of the United States Constitution.

I instruct you that any evidence obtained in violation of the United States Constitution must be rejected and cannot be considered by you in any way in determining the issues in this case.

DEFENDANTS' REQUESTED INSTRUCTION No. 7

I instruct you a search and seizure of evidence would violate the United States Constitution if it were seized by a Washington Police Officer in Washington under circumstances whereby such officer did not have a warrant for such search and seizure or have knowledge of facts which would amount to probable cause.

DEFENDANTS' REQUESTED INSTRUCTION
No. 8

In instruct you that if the Washington Police Officers searched the automobile in which defendants were riding under a claim of searching for game taken in violation of the laws and regulations of Washington, they must have probable cause to believe the defendants or one of them was guilty of a specific violation and that the fruits of such violation was present in the automobile.

It is not enough that the police officer suspected some violation or hoped he would find some evidence. He must at the time of the search have knowledge of facts which would lead a reasonable man to conclude that one or more of the defendants was guilty of a specific game law violation and the fruits thereof were in the car.

DEFENDANTS' REQUESTED INSTRUCTION
No. 9

I instruct you that a search made by Washington policemen of the automobile in which the three defendants were riding under a claim that it was done by virtue of a lawful arrest was unreasonable and unlawful in violation of the defendants' Constitutional rights and I instruct you that you must disregard all evidence or knowledge obtained thereby or resulting therefrom.

DEFENDANTS' REQUESTED INSTRUCTION No. 10

In instruct you that a search made by Washington policemen of the persons of defendants under a claim that it was done by virtue of their arrest on a traffic charge was unreasonable and unlawful in violation of the defendants' Constitutional rights and I instruct you that you must disregard all evidence or knowledge obtained thereby or resulting therefrom.

DEFENDANTS' REQUESTED INSTRUCTION No. 10A

I instruct you that a search made by Washington policemen of the persons of defendants under a claim that it was done by virtue of their arrest on a traffic charge was reasonable and lawful only so far as it related to the traffic charge, or means of accomplishing same. If you find the search of the persons of defendants bore no reasonable relation to the traffic charge, then you must ignore and reject any evidence obtained thereby.

DEFENDANTS' REQUESTED INSTRUCTION No. 11

In instruct you that a seizure by Washington policemen of material from the persons of defendants as a result of the search made for a traffic offense was unreasonable and in violation of the defendants' Constitutional rights and I instruct you that you must disregard the items of evidence obtained thereby.

DEFENDANTS' REQUESTED INSTRUCTION.
No. 12

In instruct you that a seizure by Washington policemen of material from the automobile in which defendants were riding as a result of the search for a traffic offense was unreasonable and in violation of the defendants' Constitutional rights and I instruct that you must disregard the items of evidence obtained thereby.

The Court refused to submit any question as to the aforesaid arrests, searches and seizures to the jury, and refused to give any of these requested instructions. Each defendant excepted thereto on the grounds heretofore stated and the Court allowed them such exceptions.

The evidence offered on the trial was sufficient to justify a jury verdict of guilty only if the evidence resulting from the aforesaid arrests, searches and seizures and the subject of the aforesaid motions and objections was proper and was insufficient to justify a verdict if said evidence was improperly received or should have been suppressed, stricken, or received no consideration.

APPENDIX E

Assignments of error and petition for rehearing—method of raising questions in Supreme Court of Oregon.

ASSIGNMENT OF ERROR I

The Court erred in denying pretrial motion to suppress and return illegally obtained evidence.

ASSIGNMENT OF ERROR II

The Court erred in denying defendants' objection on the trial to this illegally obtained evidence and renewed motions to suppress.

ASSIGNMENT OF ERROR III

The Court erred in overruling defendants' motion at the end of the case to strike out the illegally obtained evidence and to direct a verdict of acquittal.

1. U. S. Constitution forbids state conviction on evidence from illegal arrest, search or seizure.
2. Speeding arrest gave no authority to search vehicle.
3. Speeding arrests gave no authority to search persons.
4. Game law search was without probable cause and unlawful.
5. Open charge is always invalid.
6. Pretext should not be allowed to evade Constitution.

ASSIGNMENT OF ERROR IV

The Court erred in refusing to submit the issue of illegal arrest, search and seizure to the jury and in refusing to give any of defendants' requested instructions thereon.

PETITION FOR REHEARING

Defendants-appellants petition for rehearing of the appeal and reversal of the judgments for the following errors:

ERROR I

The procedure approved affords defendants no adequate method for vindicating their rights to due process and equal protection of the laws under the 14th Amendment to the United States Constitution and retroactively without warning deprived them of all opportunity to do so under a rule applicable to them and not to others, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

ERROR II

The procedure approved has upheld defendants' convictions on evidence known to the State to be perjured and obtained by unreasonable arrests, searches and seizures by State officers, applicable to defendants and not to others, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

AUTHORITIES

Brinkerhoff-Faris v. Hill, 281 US 673, 677-8; *Goulad v. U.S.*, 255 US 298, 313; *Herndon v. Georgia*, 295 US 441, 444 et seq.; *Stein v. New York*, 346 US 156; *State v. Bowers*, 230 Or 602, 604; *State v. Fleming*, 232 Or 412; *State v. Marshal*, — Or —, 380 P2d 799, 800; *State v. Quartier*, 114 Or 657, 665; *State v. Sack*, 210 Or 552, 556, 581-2; *Townsend v. Sain*, 372 US 293; *U.S. v. Kirchenblatt*, 2 Cir 16 F2d 202, 203; *1 Wigmore on Evidence 3d* § § 26-29; *2 Wigmore on Evidence 3d* § 446.

ARGUMENT

On their pre-trial motions to suppress, defendants were denied the opportunity to offer evidence, the trial judge determining the question from the transcript of the preliminary examination. But the magistrate had restricted defendants on this point, holding it immaterial (Nar. St. 1, Pr. Ex. 39, 54, App. Br. 2).

Although renewed in every conceivable way to the trial court, defendants were denied the opportunity of litigating the question because the trial court ruled they were precluded by the determination of the pre-trial motion (Nar. St. 1-3, 6, 7, App. Br. 5).

This Court and the trial court evidently view this Federal Constitutional Right as a matter of the admissibility of evidence, where, if there is any basis for admissibility, the evidence is to be admitted and used by the jury. *State v. Sack*, 210 Or 552, 581-2; *1 Wigmore on*

Evidence 3rd, § § 26-29; *2 Wigmore on Evidence 3rd*, § 446.

Undersigned does not believe a matter of constitutional right may be so treated: *Goulad v. U.S.*, 255 US 298, 313.

However, the trial proceeded and the evidence on the Constitutional question was heard for the first time by judge and jury both, during the course of the trial for determination, the trial judge stated, by the jury if a question of fact arose like any other defense, and by the judge if it were a question of law (Nar. St. 3-8, App. Br. 12-14) and instructions were submitted by defendants on this issue of fact for the jury (Nar. St. 8-10, App. Br. 21-24).

This would accord the trial judges ruling with *State v. Quartier*, 114 Or 657, 665, and the practice of New York and Illinois in the due process confession cases cited in the majority opinion (p. 12). *cf. Stein v. New York*, 346 US 156; *Townsend v. Sain*, 372 US 293.

In fact this would seem to have been the law of Oregon until the case at bar. *cf. State v. Marshal*, — Or —, 380 P2d 799, 800.

In Oregon, credibility of a witness is solely for the jury, not for the judge. *State v. Fleming*, 232 Or 412; *State v. Bowers*, 230 Or 602, 604.

And a verdict of acquittal is not to be directed unless there is no issue of credibility or possible inference of guilt and the trial court denied defense motion for ac-

quittal (Nar. St. 8, App. Br. 16). *State v. Sack*, 210 Or 552, 556.

When the trial judge then refused to submit this matter to the jury (Nar. St. 3-10, App. Br. 12-14), he ruled as a matter of law that no question of fact was involved.

So the matter of fact which the Supreme Court finds existed has not been determined by the trial judge, the jury or by the Supreme Court. If this Court is now advising defendants that the matter of fact was passed upon by the trial judge although all present then were unaware of it, this itself is a denial of due process. *Herndon v. Georgia*, 295 US 441, 444 et seq.; *Brinkerhoff-Faris v. Hill*, 281 US 673, 677-8.

Aware of the implications in its decision, the Supreme Court has indicated a contrary decision for other persons under like circumstances. *cf. U.S. v. Kirschenblatt*, 2 Cir 16 F2d 202, 203, per L. Hand, J. with Opinion p. 13 and Reply Br. 1.

This undoubtedly denies defendants the equal protection of the laws.

The reason for all this is obvious. No one can read this record without concluding that Sergeant Chase was a deliberate perjurer and had no thought of "aiding and abetting speeding" or "game law violation" when he acted. Even he never came up with "transporting contraband" because no one can point to any possible game

law violation in the record that would make anything "contraband."

Although the trial judge, the jury and now the Supreme Court have all indicated their belief that these defendants are guilty of burglary, none of these—trial judge, jury or Supreme Court—for himself as an honorable man with a true regard for his oath, has been able to bring himself to say he believed Sergeant Chase.

Likewise none has been able to say for himself that these convictions have not been obtained by perjury and an unreasonable search by state officers.

Some twelve years ago this Court thought it better to ignore its precedents and opinions to wash our own "dirty linen" in the post-conviction field and not leave it to the Federal Courts. You have never regretted that step. This case merits the same farsighted approach.

APPENDIX F

Additional statutes involved. Revised code of Washington.

46.64.015 Citation and notice to appear in court—Issuance—Contents—Written promise—Arrest. Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor, the arresting officer may serve upon him a traffic citation and notice to appear in court. Such citation and notice shall conform to the requirements of RCW 46.64.010, and in addition, shall include spaces for the name and address of the person arrested, the license number of the vehicle involved, the operator's license number of such person, if any, the offense charged, the time and place where such person shall appear in court, and a place where the person arrested may sign. Such spaces shall be filled with the appropriate information by the arresting officer. The arrested person, in order to secure release, and when permitted by the arresting officer, must give his written promise to appear in court as required by the citation and notice by signing in the appropriate place the written citation and notice served by the arresting officer. Upon the arrested person's failing or refusing to sign such written promise, he may be taken into custody of such arresting officer and so remain or be placed in confinement: *Provided*, That an officer shall not serve or issue any traffic citation or notice for any offense or violation ex-

cept when said offense or violation is committed in his presence.

46.64.020 Nonappearance after written promise, misdemeanor. Any person wilfully violating his written and signed promise to appear in court, as provided in this title, shall be guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested: *Provided*, That a written promise to appear in court may be complied with by an appearance by counsel.

46.64.030 Procedure governing arrest and prosecution. The provisions of this title with regard to the apprehension and arrest of persons violating this title shall govern all peace officers in making arrests without a warrant for violations of this title for offenses committed in their presence, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for other like offenses.

FILED
JUN. 4 196
JOHN F. DAVIS, CLE

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1082

ROBERT LEWIS KROGNESS, NEIL H. HART and THOMAS EDGAR RUSSELL, *Petitioners*,

vs.

THE STATE OF OREGON, *Respondent*.

BRIEF IN OPROSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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JURISDICTION

Respondent, the State of Oregon, respectfully takes the position that this court is without jurisdiction in this matter because there is no Federal Constitutional question presented as the defendants were afforded the protection of the Constitution of the United States and the Constitution of the State of Oregon as regards protection against unreasonable arrest, search and seizure. The constitutional rights of the defendants pertaining to unreasonable search and seizure, of which rights the defendants availed themselves at all steps of the proceedings, have been passed upon by all courts of record available to the defendant in the State of Oregon.

STATEMENT OF THE CASE

The statement of the case presented in the appellant's brief is adequate with the following exception. Under the heading Motion to Suppress found at pages 3 and 4 of appellant's brief the following statement appears:

> "But the magistrate on the preliminary examination had refused evidence on this matter holding it immaterial"

In fact the defendants, who were represented by counsel at the preliminary hearing, were afforded an opportunity, limited only by the rules of evidence, to vigorously cross examine the arresting officer and other witnesses in the area of the nature of the arrest and search and seizure. That there is nothing in the transcript of the preliminary hearing in this matter indicating that the magistrate refused to hear such evidence, and such evidence was in fact heard.

ARGUMENT

It is the position of the State of Oregon that the defendants were afforded, and availed themselves of, every constitutional guarantee of the United States Constitution, and the Constitution of the State of Ore-

gon throughout the proceedings. First, at the preliminary hearing, defendants were afforded an opportunity to examine all witnesses and exhibits in connection with search and seizure. Second, a timely motion to suppress was filed prior to trial, which motion was considered by the trial judge based upon the transcript of the preliminary hearing containing testimony illicited by defendants' counsel during the preliminary hearing. It is further to be noted that all witnesses connected with and active in the arrest, search, and seizure were examined by defense counsel at the preliminary hearing. The trial court then being fully advised of the facts and circumstances from examination of the transcript of the preliminary hearing and upon having heard arguments of the defense counsel in regard to the questions of arrest, search, and seizure denied the motion for suppression of the evidence, granting the defendants the privilege of renewing this objection at the time of the trial. Third, that the defendants exercised this privilege at the time of trial, again with the same witnesses as appeared in the preliminary hearing as respects question of search and seizure, the defendants examining these witnesses a second time on this question. This issue was also argued to the jury by defense counsel at the conclusion of the case. Defendants were also heard by the court on the question of instruc

tions as to the search and seizure, which instructions of the Court subsequently refused.

It is manifestly obvious that defendants were given every opportunity to exercise their privilege against unreasonable arrest, search, and seizures and throughout the entire proceedings the Courts afforded defendants opportunity to exercise these rights in accordance with the constitution of the State of Oregon and the Constitution of the United States, and the judgment of the Circuit Court was subsequently affirmed by the Supreme Court of the State of Oregon.

CONCLUSION

The State of Oregon respectfully concludes that this court is without jurisdiction on the present appeal because in the decision below a reasonable standard commensurate with the requirements of This Court and the requirements of the Supreme Court of the State of Oregon was applied to the question of search and seizure and no constitutional rights of the defendants have been violated.

Respectfully submitted,

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